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Supreme Court of the United States

October Term, 1947.

No. 95.

ALEXANDER WOOL COMBING COMPANY, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

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LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

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Opinions of the Courts Below.

The opinion of the District Court for the District of Massachusetts is reported in 66 Fed. Sup. 389, and is found at page 11 of the record. The opinion of the Circuit Court of Appeals for the First Circuit is reported in 160 Fed. 2nd 103, and is found at page 241 of the record.

Jurisdiction.

This case comes to this Court upon a petition for certiorari, granted on June 16, 1947. Jurisdiction was invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1945.

Concise Statement of the Case.

This case arose under the First Renegotiation Act, so-called. See *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. . . . ; 91 L. Ed. 1313, 1316.

The petitioner was the defendant and the respondent was the plaintiff in an action under the Act in the District Court of the United States for the District of Massachusetts in which judgment was entered for the plaintiff in the amount of $17,590.10 on June 21, 1946. The Circuit Court of Appeals for the First Circuit affirmed the judgment below on March 26, 1947, adopting the opinion of the District Court as grounds for its decision.

The complaint in the District Court alleged that after notice to the defendant, proceedings for the renegotiation of defendant's contracts and subcontracts were conducted by representatives of the Secretary of War, and that thereafter on September 6, 1944, the Under Secretary of War, acting under the Renegotiation Act, determined that of the profits realized by defendant on contracts and subcontracts subject to renegotiation in the fiscal years ended June 30, 1942, and June 30, 1943, $22,500 and $45,000 respectively, were excessive profits. The prayer for judgment was for these amounts less the tax credits allowable under I. R. C., Section 3806, which were alleged. The judgment was in accordance with the complaint.

The answer asserted that the Act as applied to the defendant was unconstitutional because

> "a. It is repugnant to Article I, Sections 1 to 8, of the Constitution of the United States in that it unlawfully delegates legislative power to the secretaries of the departments and others;
>
> "b. It is repugnant to the Fifth Amendment to the Constitution of the United States in that it deprives defendant of property without due process of law;
>
> "c. It is repugnant to the Fifth Amendment to the Constitution of the United States in that it takes defendant's property for public use without just compensation;

"d. It is repugnant to the Tenth Amendment to the Constitution of the United States in that it exercises a power not delegated to the United States."

The answer also asserted that the determinations were null and void because made without due process of law, in that

"a. They were made, in part, upon a consideration of certain financial, operating, and other data, not submitted by the defendant but obtained by the under secretary of war from other sources unknown to defendant and not offered at any hearing nor otherwise disclosed to defendant, although defendant requested a full disclosure thereof so that it might contradict or qualify the same by other evidence and offer argument as to the effect of such evidence;

"b. They do not contain any findings of facts sufficient to justify the conclusion that defendant realized excessive profits in the years to which they relate."

Although the plaintiff made a motion for judgment on the pleadings and in the alternative for summary judgment upon the basis of certain affidavits, the District Court took evidence and decided the case "upon the basis of the papers • • • plus any testimony so far as legally relevant" (R. 19).

The evidence briefly summarized showed the following:

The defendant was in the business of combing grease wool into tops and noils on a commission basis. It did not enter into any contracts with a department as that word is used in the Act. It did not do work for others whom it knew to have contracts with a department, and none of the wool which it processed was designated or appropriated for any specific contract by another with a department at the time when the work was done. The defendant, however, knew that the tops and noils which it produced would flow in the course of commerce into the hands of persons per-

forming government contracts and that probably a substantial portion would be used for that purpose.

The charges which the defendant made for its work were at fair market rates, competitive with those made by others in the same business, and frozen by the General Maximum Price Regulation issued by the Price Administrator at those prevailing in March, 1942 (R. 25, 232).

The Under Secretary's determinations that the defendant had realized excessive profits were not preceded by a fair hearing. No hearing was ever given before any person authorized to make a determination. At the conferences with representatives of the War Department to which defendant was invited, no issue was ever presented. Evidence as to sales, prices, and profits of other persons in the same business was considered but not disclosed to the petitioner. No standards to be applied to the facts found were disclosed, and it was represented that there were none. No findings other than the formal recitations in the Under Secretary's determinations were ever made (R. 235-236).

The decision of the District Court was, in substance, that the Act was constitutional and that the petitioner could not challenge the determination because it had failed to resort to the Tax Court.

The Statutes Involved.

Renegotiation originated as Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, the Act of April 28, 1942. It was then applicable only to contracts with the War Department, the Navy Department, and the Maritime Commission.

Subsection (c) of that Act provided:

"(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act."

The Act of April 28, 1942, contained no definition of "profits", "excessive profits", "subcontract", or "subcontractor".

The petitioner was not a "subcontractor" in any ordinary sense of that word. It is believed that the Act of April 28, 1942, was not applicable to it.

Section 403 was amended by the Act of October 21, 1942, which provided that the amendments made thereby should

become effective as of April 28, 1942. Subsection (a) as amended, provided:

> "(5) The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property."

If the petitioner was not a subcontractor within the language of the Act of April 28, 1942, the Act of October 21, 1942, was given retrospective effect to create a liability on account of contracts completed and profits realized prior to its enactment.

The Secretaries of the Department have construed the word "required" in the definition of "subcontract" as meaning "ultimately used". The result is that liability may accrue under the Act, so construed, after contracts have been completed and profits realized, when and if other persons appropriate the articles involved to the performance of contracts with a Department.

The Act of October 21, 1942, contained no definition of "profits". It defined "excessive profits", however, as follows:

> "(4) The term 'excessive profits' means any amount of a contract or subcontract price which is found as the result of renegotiation to represent excessive profits."

No standards are set up, nor are even "factors for consideration" mentioned, to aid in making a finding of excessive profits. The Statute permits profits made upon sales at fair market prices and at or below maximum prices

established by the Office of Price Administration to be found to be excessive.

Nor does the Statute require a finding that excessive profits of a subcontractor were realized at the expense of the United States; any part of the sales price of the subcontractor reflecting an excessive profit may have been absorbed in the price charged by the prime contractor.

Subsection (c) was amended by the Act of October 21, 1942, so as to read as follows, in part:

> "(1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.
>
> "(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to re-

cover from such contractor or subcontractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. * * *

* * *

"(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contract or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) the aggregate sales by the contractor or subcontractor and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed $100,000 for the fiscal year of such contractor or subcontractor.

"No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs."

The liability created by the Act is, accordingly, one contingent upon the formation of an opinion by the Secretary of a Department, or by some one to whom he has delegated his authority, within one year after the close of each fiscal year. The Secretary of a Department might not be able to form an opinion as to whether or not excessive profits were being realized or were likely to be realized. Those to whom his authority was delegated might, if they formed opinions, differ in their opinions, or might not form any opinion. Of two contractors or subcontractors performing

the same work and realizing profits at the same rate, one might, therefore, find his contracts renegotiated while the other was allowed to retain the full amount.

A contractor might realize profits on certain contracts and losses on others. The Secretary might renegotiate only those contracts on which profits were made, or might renegotiate all contracts as a group and offset losses against profits. A contractor might realize profits in the first six months of a year and sustain losses in the last half. There is nothing in the Act to require the Secretary to renegotiate business done by fiscal years.

The discretion of a Secr tary to group contracts for periods which he may choose permits him to find excessive profits in short periods which could not be found over longer periods. In this case, defendant's contracts for the two months from April 28, 1942, to June 30, 1942, were renegotiated.

Subsection (1) (2) of Section 403 provides:

"The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

* * *

"(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

"(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the pro-

visions of the contract are otherwise adequate to prevent xcessive profits.

"The Secretary may so exempt contracts and subcontracts both individually and by general classes or types."

Under these provisions a Secretary might in his discretion have exempted the defendant's contracts from renegotiation, or the contracts of one or more of the defendant's competitors. He might have done so under clause (ii), whether or not in his opinion excessive profits would be realized, if it was also his opinion that the profits could be determined with reasonable certainty when the contract price was established.

The liability of contractors and subcontractors under the Act was, therefore, wholly within the discretion of the Secretaries. The Secretaries were at liberty to exercise their discretion in varying ways, and to differ in their opinions. They were authorized but not bound to make investigations and form opinions.

By the Act of February 25, 1944, after the liability, if any, of the defendant for excessive profits during the years here involved had accrued, Section 403 was again amended. Most of the amendments made were to be effective only with respect to fiscal years ending after June 30, 1943, and have, therefore, no application to this case. Subsection (e) added by the amendment gave contractors and subcontractors a right of review in the Tax Court. Subsection (e) (2), applicable to years ending prior to July 1, 1943, provides as follows:

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July

1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

Subsection (e) (1) provides that a determination by the Tax Court "shall not be reviewed or redetermined by any court or agency."

Specification of Errors.

No assignment of errors was filed in the District Court upon appeal to the Circuit Court of Appeals since none was required under the Federal Rules of Civil Procedure in effect. The errors intended to be urged appear in the statement of "Reasons relied on for the Allowance of the Writ" in the petition. In the interest of brevity no further specification is here made.

Summary of Argument.

1. The petitioner was entitled to defend on the grounds that the Act is invalid and that the determinations were not duly made.

2. The Act violates the Fifth Amendment, for

A. The liability imposed upon the defendant is for a penalty as the result of the acts of others, and, therefore, its enforcement deprives the defendant of its property without due process of law.

B. The liability imposed by the determination that the defendant realized excessive profits during its fiscal year ended June 30, 1942, is as a result of a retroactive application of the Act of October 21, 1942, and, therefore, its enforcement deprives the defendant of its property without due process of law.

C. The liability imposed, where as in this case it is for a part of the fair market price, effects an appropriation of private property for public use without just compensation.

3. The Act improperly delegates legislative power to the Secretaries of Departments and their delegates.

4. The determinations were not duly made, for

A. A fair hearing was a condition precedent to any determination that excessive profits had been realized.

B. The determinations were made without a fair hearing.

Argument.

1. The petitioner was entitled to defend on the grounds that the Act is invalid and that the determinations were not duly made.

The complaint alleges that "the under Secretary of War, acting under and by virtue of the Renegotiation Act . . . duly determined" that the petitioner had realized excessive profits in 1942 and 1943.

The suit assumes, therefore, the validity of the Act and asserts the validity of the determinations.

The petitioner denies that the Act is valid, and denies, if it is valid, that the determinations were duly made.

The issues so raised are plainly judicial issues which may and, we submit, should be determined by this Court.

In the District Court and in the Circuit Court of Appeals the government took the position that, while the constitutionality of the statute was properly in issue, the question whether the determinations were duly made was immaterial because the petitioner had not sought a redetermination of its liability in the Tax Court as permitted by the Act of February 25, 1944, and had not, therefore, exhausted its administrative remedies.

(a) As to the petitioner's right to show the Act invalid.

While we have no reason to expect that the government will change its position in this Court and contend that the petitioner may not, because of its failure to apply to the Tax Court, rely upon the unconstitutionality of the statute as a defense, we shall deal briefly with the point out of abundant caution.

We assert, as a general proposition: When the United States seeks under a provision of a statute to enforce by judicial proceedings a liability alleged to have been created by that statute, the defendant should be allowed to challenge its constitutional validity, even though he has not resorted to an administrative tribunal which might have determined for one reason or another that no liability existed.

If, in such a case, failure to resort to an administrative remedy will give effect to an Act otherwise beyond the powers of Congress, it must be upon a theory of waiver or estoppel. To ignore the existence of a statute, and to refuse to obey it is, however, the traditional way of challenging its constitutionality. To seek a remedy provided by the Act in order to escape a liability asserted under it appears to concede its validity, at least unless constitutional rights are reserved.

Great Falls Mfg. Co. v. Garland, 124 U. S. 581.
Wall v. Parrot Silver & Copper Company, 244 U. S. 407, 411.
United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 307.
Hirsch v. Block, 267 Fed. 614.

Neglect of such a remedy can hardly be regarded as a true waiver.

Constitutional issues may, however, require a determination of facts as well as of law. One who objects to the application of a statute in such a case has, of course, the burden of showing the facts which overcome the presumption of constitutionality. Where the matters of fact involved raise administrative rather than judicial questions, they should, of course, be determined by an administrative tribunal. Failure to seek an administrative determination

may in such a case be given effect as a waiver of the constitutional issue.

Yakus v. United States, 321 U. S. 414, 430.
United States v. Ruzika, 329 U. S. 287.

And where an appeal to a Circuit Court of Appeals is given from an administrative determination, failure to take such an appeal may conclude the judicial questions involved in the determination.

White v. Johnson, 282 U. S. 367, 373.

Failure to seek an administrative review and to exhaust that remedy may also be in connection with other circumstances a sufficient reason for denying relief in a proceeding initiated by one asking a judicial declaration that a statute is unconstitutional.

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. . . . ; 91 L. Ed. 1313.

But an administrative determination, though final on administrative questions, is not conclusive as to judicial issues involved. For instance, an administrative tribunal cannot finally determine the extent of its own powers.

Crowell v. Benson, 285 U. S. 22.
Newport News S. & Dry Dock Co. v. Schauffler, 303 U. S. 54.
Social Security Board v. Nierotko, 327 U. S. 358, 369.

And Congress may not grant to an administrative tribunal exclusive jurisdiction to decide constitutional questions.

Ng Fung Ho v. White, 259 U. S. 276.
State Corp. Com. v. Wichita Gas Co., 290 U. S. 561, 564.

St. Joseph Stockyards Co. v. U. S., 298 U. S. 38, 52, 77.
United States v. Carolene Products Co., 304 U. S. 144, 152.

Accordingly, where a constitutional defect in legislation will appear without any administrative determination of the facts, one may challenge an administrative order without exhausting a right of administrative review. In other words, where exhaustion of the administrative process would leave the constitutional issues unaffected, it is unnecessary to go through the form of an administrative hearing.

McNeil v. Southern R. Co., 202 U. S. 543, as explained by Mr. Justice Holmes in *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, at 231.

So, where a zoning ordinance, invalid *in toto*, constitutes a cloud on title, the owner may have its enforcement enjoined although he has not sought relief from its provisions before a board constituted by the ordinance.

Euclid v. Ambler Realty Co., 272 U. S. 365, 386.

One prosecuted for selling without a license in violation of a statute may show that the law is unconstitutional, although he has not applied for a license.

Smith v. Cahoon, 283 U. S. 553, 562.
Jones v. Opelika, 316 U. S. 584, 589.

While a defendant in an enforcement proceeding under the Emergency Price Control Act may not challenge the constitutionality of a regulation not invalid on its face, he may attack the Act itself, although he has not exhausted his administrative remedies.

Yakus v. United States, 321 U. S. 414, 430.
Case v. Bowles, 327 U. S. 92, 99.

When the United States sues for taxes, the defendant may show that the assessment was of persons or property not taxable, although he has not appealed to the Commissioner of Internal Revenue as authorized by the statute.

Clinkenbeard v. United States, 21 Wall. 65.
United States v. Rindskopf, 105 U. S. 418.
Ogden City v. Armstrong, 168 U. S. 224, 241.
Bowers v. American Surety Co., 30 F. 2nd 244 (CCA-2).

If the only issues which a person affected by a law desires to raise cannot finally be determined upon administrative review, there is no sound reason why he should be required to apply for and exhaust that remedy. Those issues may as conveniently be determined by a Court in the first instance. Surely, such a person cannot be required to raise other issues and to pursue them diligently as a condition precedent to making constitutional objections to the validity of the statute itself. Unless there is such a requirement, exhaustion of the administrative remedy would be a merely formal requirement.

Whatever may be the general rule, it seems clear that in a suit under the First Renegotiation Act its invalidity may be shown, although no petition for a redetermination has been filed in the Tax Court.

If the Under Secretary had attempted to eliminate excessive profits of the petitioner, not by suit, but "by withholding", or "by directing a contractor to withhold for the account of the United States", as authorized by Subsection (c) (2), the constitutionality of the Act might be put in issue in a suit by the petitioner for "amounts otherwise due" either against the United States or the contractor.

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. . . . ; 91 L. Ed. 1313, 1326.

> "Suits of that character are not forbidden, either expressly or impliedly by the Renegotiation Acts. Nor are they made dependent upon completion of the Tax Court proceedings. Moreover, we know of no reason why every question of constitutionality which has been raised in this suit could not be presented and determined in such a suit."

A fortiori, questions of constitutionality are open when a Secretary attempts to eliminate excessive profits by a suit authorized by a specific provision of the Act, *i. e.*:

> "The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection."

It is to be noted also that the foregoing grant of jurisdiction was made by the Act of October 21, 1942, before the petitioner was given a remedy by the Tax Court. It will hardly be urged that, if there were no remedy in the Tax Court, the District Court would lack jurisdiction to determine constitutional questions. If that jurisdiction has been lost, or though retained will not be exercised, it is not by reason of any amendment of language, but solely because an additional forum has been provided in which constitutional as well as other issues may be raised. There is, however, no necessary inconsistency in giving one affected by a law two remedies, one in a Court and the other administrative.

Smithmeyer v. United States, 147 U. S. 342, 358.
Moore v. Illinois Central R. Co., 312 U. S. 630, 636.

In granting the remedy in the Tax Court to contractors aggrieved by a determination of a Secretary, Congress did not provide, as it did with respect to the orders of the Board created by the Revenue Act of 1943, that such a

determination "shall be final and conclusive and not be subject to review or redetermination by any court or other agency" in the absence of resort to the Tax Court. It is not to be assumed that the silence of the statute with respect to the determinations of a Secretary bars from the Courts an otherwise justiciable issue.

Stark v. Wickard, 321 U. S. 288, 309.

This suit was not brought until after the remedy in the Tax Court had been created by the Act of February 25, 1944. Suits under the First Renegotiation Act may have been brought, however, prior to that date. Constitutional issues could surely be raised in suits then pending. Moreover, a petition addressed to the Tax Court does not automatically stay a suit in a District Court to enforce the determination of a Secretary. Accordingly, the District Court might proceed to judgment although such a petition was still pending. If the District Court in its discretion concluded that it should not await the decision of the Tax Court, it would clearly be bound to determine the constitutional issues.

United States v. Abilene & S. R. Co., 265 U. S. 274, 282.

Even if a suit in the District Court were stayed, it is submitted that that Court would not be bound by a decision of the Tax Court on constitutional questions.

Interstate Commerce Com. v. Brimson, 154 U. S. 447, 485.
Crowell v. Benson, 285 U. S. 22, 56.
St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 52, 77.

To require all issues including constitutional ones to be submitted, in the first instance, to the Tax Court and to

make its decision of those issues conclusive upon the District Court, would be to make the District Court a mere arm to enforce the determination of a Secretary or of the Tax Court by issuing execution.

But the District Courts of the United States are constitutional courts, upon which only judicial power can be conferred.

Ex parte Bakelite Corporation, 279 U. S. 438, 449.
Muskrat v. United States, 219 U. S. 346, 356.

An exercise of judicial power must have certain features. "The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication."

Old Colony Trust Co. v. Com., 279 U. S. 716, 724.

While a case or controversy may exist although the plaintiff's claim is, in fact, uncontested or incontestable, the judicial power can hardly extend to a situation in which the Court is precluded from considering any questions of law or fact and its judgment is, in substance, merely a ministerial act founded upon an administrative determination of all issues.

Pope v. United States, 323 U. S. 1, 11.

If the petitioner could not show in the District Court that the statute was unconstitutional or that the determination was not duly made, there would be no case or controversy before that Court.

It should be presumed that in authorizing a Secretary to bring actions on behalf of the United States in the appropriate Courts of the United States, Congress intended to leave some issues for the exercise of the judicial power of those Courts.

It is to be noted that it is the United States and not the petitioner which invoked the judicial power of the District Court. The case, too, is substantially different from one in which a privilege is sought from the United States. Here the United States seeks money. It is true that the Tax Court might have decided upon grounds other than the unconstitutionality of the Act that the United States was entitled to nothing. It has already decided the constitutional issues adversely.

Stein Bros. Mfg. Co. v. Secretary of War, 7 T. C. 863.

Ring Constr. Corp. v. Secretary of War, 8 T. C. 1070.

But, even if the petitioner had believed that the Tax Court might decide upon other grounds that it was not liable under the Act, it would have been obliged to wait for years for a decision from that Court and to incur substantial expense upon a trial of the facts. Moreover, although the Act provides that a proceeding before the Tax Court shall be "treated as a proceeding *de novo*", that Court has ruled that the burden of proof is upon the petitioner to show that the determination of a Secretary is erroneous.

Cohen v. Secretary of War, 7 T. C. 1002.
Ring Constr. Corp. v. Secretary of War, supra.

In view of the absence of any standards in the Act by which "excessive profits" may be determined, other than those which may be implied from the words themselves, the burden of proof placed upon a petitioner in Tax Court proceedings may be very great. Since no statement of findings or of reasons for a Secretary's determination was required under the First Renegotiation Act, the petitioner is in effect compelled to negative any rational basis for

the determination. The problem of deciding whether excessive profits have been realized and in what amount is obviously difficult enough. To show that a conclusion reached is without any foundation may seem impossible.

If Congress intended to make the relinquishment of the right to have issues of fact determined by the Tax Court equivalent to a waiver of constitutional defects in the Act, we submit that it exceeded its powers. Congress might require the petitioner to try all questions arising under the Act in the Tax Court. But to provide that a failure to initiate proceedings under the Act will constitute a waiver of its constitutional defects is quite a different matter. A statute might as well provide that anyone failing to object to its validity within ninety days should be deemed to have assented to its terms. If an Act is beyond the powers of a legislature, it cannot extend those powers by requiring those affected to manifest their dissent.

In any event no such intent is found in the First Renegotiation Act as amended. The Courts indulge in a presumption against waiver of constitutional rights.

Johnson v. Zerbst, 304 U. S. 458, 464.

The Courts should also presume that Congress does not intend to coerce such waivers.

(b) *As to the petitioner's right to show that the determinations were not duly made.*

The complaint alleges that the Under Secretary of War "duly determined" that the petitioner's profits in 1942 and 1943 were excessive.

The answer sets up that the determinations were null and void because made without due process of law.

In substance, the petitioner's contentions are that a fair hearing before the Secretary, or some one to whom he had delegated his authority, was a condition precedent to any determination; that the petitioner was not given a fair hearing; and that there was, therefore, no determination to be reviewed in the Tax Court, or to be enforced by suit.

The Government, in effect, conceded that the petitioner was not given a fair hearing before any determination. Its position seems to be either that no hearing was required before a determination by a Secretary or that, if such a hearing was required, no advantage could be taken of the defect in the proceedings since the petitioner had not elected to ask for a hearing *de novo* in the Tax Court.

We shall argue hereinafter that a fair hearing before the Secretary was a condition precedent to a determination. We concede that, absent that requirement, which we here assume, the determinations were duly made. At this point, however, we suggest that the Court consider the case as though the statute expressly provided that a Secretary should grant a contractor or subcontractor a fair hearing before making a determination that excessive profits had been realized, and that the complaint alleged that determinations had been made by the Under Secretary without a hearing but that the petitioner had failed within ninety days thereafter to seek a redetermination in the Tax Court.

May the United States recover in such a case? We submit that it cannot. If not, the petitioner should have been permitted to show that it had not been granted a fair hearing.

If a fair hearing is a condition precedent to a determination made by a Secretary, a determination without such a

hearing is beyond the power of a Secretary and is null and void.

United States v. Abilene & S. R. Co., 265 U. S. 274, 290:

"The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."

United States v. Baltimore & O. R. Co., 293 U. S. 454, 464:

"This complete absence of 'the basic or essential findings required to support the Commission's order' renders it void."

Morgan v. United States, 298 U. S. 468, 477:

"For the statute itself demands a full hearing and the order is void if such a hearing was denied."

To hold that such a determination becomes effective unless a petition for redetermination is filed in the Tax Court within ninety days is to nullify the requirement that a hearing be granted as a condition precedent.

An appeal need not be taken from a void order.

Voorhees, et al. v. Jackson, 10 Pet. 449, 474.

The fact that the appeal takes the form of a proceeding *de novo* should not throw the burden on the petitioner of seeking review of a void determination. A *de novo* proceeding is not and never has been an entirely new proceeding within the view of the Tax Court.

E. J. Barry, 1 B. T. A. 156, 157.

As poionted out above, the Tax Court gives the determination of a Secretary presumptive effect and imposes the burden upon a petitioner of showing that its profits were

not excessive in the amount found by a Secretary. That presumption must be founded on evidence disclosed neither to the petitioner nor to the Tax Court. The petitioner would, therefore, be deprived of the kind of a hearing which Congress chose to give him. Compare.

Ashbacker Radio Corp v. Federal Communications Com., 326 U. S. 327, 332-334.

Saltzman v. Stromberg-Carlson Telephone Mfg. Co., 46 F. 2nd 612, 614.

Indeed, it must be doubtful whether the Tax Court has any jurisdiction in a case where a determination was not preceded by a hearing and is, therefore, void. That Court has held that it was without jurisdiction of a petition filed before a tentative determination made by a delegate of the War Contracts Price Adjustment Board.

Aircraft & Diesel Equipment Corp. v. Stimson, 5 T. C. 362.

Since the Tax Court has jurisdiction only of petitions filed by persons "aggrieved by a determination," it could hardly conduct its proceedings as if there had been none, and decide the case without regard to a prior determination. Whatever the Tax Court's jurisdiction may be if a petitioner waives its right to a hearing before a Secretary, the petitioner could not insist in that Court that there had been no determination. The instant case is, therefore, distinguishable from *Carter v. Kubler*, 320 U. S. 243, where the statute permitted the Court to reject a commissioner's findings and to reach his own conclusion solely on evidence before the Court.

The case is clearly distinguishable, too, from one in which under the statutory scheme provision is made for a hearing after an administrative order. Where the order in such a

case takes effect only *in futuro*, or its effect is stayed until after opportunity for a hearing, the requirements of due process are met.

Yakus v. United States, 321 U. S. 503, 521.
Porter v. Investors' Syndicate, 286 U. S. 461.

Here the Act expressly provides that the filing of a petition in the Tax Court shall not operate as a stay. Whether the District Court by virtue of its inherent powers could stay a suit by the United States in the face of this provision is questionable. At least, no automatic stay would result.

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. . . . ; 91 L. Ed. 1313.

The case seems to us, in all important respects similar to that presented where a Court has entered a judgment without due process of law. The question whether or not the petitioner had realized excessive profits and if so in what amount is essentially a judicial question.

Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226.
Keller v. Potomac Electric Power Co., 261 U. S. 428, 440.
Baltimore & O. R. Co. v. United States, 264 U. S. 258, 265.
Crowell v. Benson, 285 U. S. 22, 51.
Morgan v. United States, 298 U. S. 468, 480.

We urge hereinafter that the Renegotiation Act is unconstitutional because it permits the United States to recover as excessive profits some part of the price of goods sold representing just compensation. If the Act is to be construed as limiting recovery of excessive profits to amounts in excess of just compensation, it is settled that

the determination of just compensation is a judicial function.

U. S. v. New River Collieries Co., 262 U. S. 341.
Monongahela Navigation Co. v. United States, 148 U. S. 312, 327.

Suppose a District Court, passing upon a similar question, should announce that the Court had knowledge of certain facts which it would consider in forming a judgment but which it would not disclose to the defendant. It seems clear that no other Court would enforce such a judgment, although the defendant had failed to take an appeal to a Circuit Court of Appeals.

Escoe v. Zerbst, 295 U. S. 490, 494:

"When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is denied altogether, the ensuing mandate of the Court is void, and the prisoner confined thereunder may have recourse to *habeas corpus* to put an end of the restraint."

Sunal v. Large, 331 U. S. ...., 91 L. Ed. 1555.
Griffin v. Griffin, 327 U. S. 220, 228:

"A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. * * * Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process."

United States v. United States F. & G. Co., 309 U. S. 506, 514.
Baker v. Baker, Eccles & Co., 242 U. S. 394, 403.
Old Wayne Mut. & Ins. Co. v. McDonough, 204 U. S. 1, 15.
Hovey v. Elliott, 167 U. S. 409, 444.

Windsor v. McVeigh, 93 U. S. 274, 277.
Restatement of the Law: Judgments, Secs. 6, 11.

An administrative order which is lacking in due process because made without a fair hearing should have no greater effect than the judgment of a Court similarly lacking. The doctrine of exhaustion of administrative remedies should not result in validating orders beyond the jurisdiction of the agency.

Skinner & Eddy Corp. v. United States, 249 U. S. 557, 562.
Ogden City v. Armstrong, 168 U. S. 224, 240-241.
Saltzman v. Stromberg-Carlson Telephone Mfg. Co., 46 F. 2nd 612, 613.

We point out again, in this connection, that the remedy which the United States had invoked in its suit in the District Court against the petitioner was created by language which became law long before any remedy in the Tax Court was given to the petitioner. When the remedy by suit was originally given the petitioner would clearly have had the right to show in defense defects in procedural due process in reaching a determination. There is no evidence that Congress intended to restrict that right by the Act of February 25, 1944.

2. THE ACT VIOLATES THE FIFTH AMENDMENT, FOR

A. The liability imposed upon the defendant is for a penalty as the result of the acts of others, and, therefore, its enforcement deprives the defendant of its property without due process of law.

The defendant in this case made no contracts with the United States. Its contracts were to process wool for others into wool tops and noils. Whether the defendant should be held liable, as the word "subcontractor" was

construed by the Departments, depended upon the end use of those products, that is, upon the will of those to whom the tops and noils were later sold. The defendant had no control over their sales and did not and does not know whether in fact the end use of the tops and noils was in the performance of government contracts or in other contracts. All that it knew when it performed its contracts was that the end use of a large part of the wool was probably in the performance of such contracts. It received no more for its work if the end use was in the performance of government contracts rather than of other contracts. It had no right to direct how the wool should be used. Tops and noils combed by the defendant might be substituted for tops and noils combed by others at any time before they were actually appropriated to the performance of a government contract. Even though intended for performance of such a contract, they might not be used for that purpose.

The defendant's liability, and that of many other so-called "subcontractors" under the Act, depended not upon its own act but upon the acts of others subsequent to the performance of its contracts and beyond its control.

Such a liability, it is needless to say, is extraordinary. Our law does not usually impose a liability upon one by reason of the acts of others.

It is conceded that the liability which the Act creates is not one for a tax. Nor can it, in the case of a subcontractor such as the defendant, be considered contractual. The defendant made no contracts with the United States.

The cases which have sustained the Act have done so on the theory that it was an exercise of the power to wage war and to wage war successfully.

No one, of course, denies the existence of the power to wage war successfully. It is conceded that that power will

justify extraordinary regulations and restrictions of what are thought to be fundamental liberties in peacetime. It is conceded that that power may justify profit limitations and other regulations of profits, and that, if Congress has the power to regulate, it may impose penalties and sanctions to enforce those regulatory measures. It is conceded, finally, that a liability to pay over to the United States the excess of profits realized over the amount permitted is an appropriate form of penalty.

But the power to wage war successfully will not justify every measure which may in fact aid in the prosecution of a war. Even the war power is subject to constitutional limitations. Obviously, a government conducting a war to maintain a constitutional form of government may not disregard its own limitations in order to perpetuate itself. For instance, the power to wage war successfully does not authorize a taking of private property for public use without just compensation.

Obviously, Congress may not impose penalties upon those who insist upon their constitutional rights. If private property may not be taken for public use without just compensation, one who requires that just compensation be paid for his property cannot be subjected to fines or forfeitures, even though just compensation may yield a profit so large as to be thought excessive by a Secretary. The fact that a penalty is termed a "recapture of excessive profits" will not prevent its being recognized as invalid.

We go further. We submit that Congress may not impose penalties upon persons for conduct because of events occurring thereafter and beyond the control of those penalized. One who makes a sale of his property at a lawful price owns the proceeds. If he is to be deprived of a part of the price because the property is later taken or acquired by contract for public use, he is deprived of just compensa-

tion where the price represented only such just compensation. But a lawful price may exceed fair market value, or just compensation. If he is to be deprived only of that part of the price in excess of just compensation, we submit that such a "recapture" is without due process of law. His bargain was lawful when made and is subject to the protection of the Fifth Amendment.

The fact that the seller may have anticipated that his property might be subsequently acquired for public use is not enough to warrant the conclusion that he holds in trust for the United States whatever portion of the price may later be found to be excessive. *Dayton-Goose Creek Railway Co. v. United States*, 263 U. S. 456, is clearly distinguishable. The Renegotiation Act contains too many uncertainties to justify "recapture" of profits on the theory that any seller became a trustee of proceeds of sales merely because he expected or might reasonably have expected that the property sold would after further processing form the subject matter of a contract with a Department.

To impose a penalty payable in money upon conduct otherwise lawful by reason of subsequent events over which the person penalized has no control seems clearly to deprive such person of property without due process of law. That much is implied in

Wickard v. Filburn, 317 U. S. 111.
Mulford v. Smith, 307 U. S. 38.

Indeed, even a tax on transfers made prior to the date of the taxing statute has been held invalid as in violation of the due process clause of the Fifth Amendment.

Nichols v. Coolidge, 274 U. S. 531.
Untermyer v. Anderson, 276 U. S. 440.
Coolidge v. Long, 282 U. S. 582.

It seems clear that the liability for excessive profits which the Act attempts to impose is in its nature a penalty. The power of Congress to create liabilities *in invitum*, other than for taxes, can only be incidental to some other power and as a means of compelling obedience to its exercise. An appropriation of excessive profits realized on transactions between private persons, in which the United States has no interest when effected, cannot in any accurate sense be regarded as a "recapture". "Recapture" in such a case is merely a euphemism for a penalty imposed for realizing what in the opinion of a Secretary may be "excessive profits."

The penalty is analogous to that which the War Industries Board attempted to impose upon wool dealers in 1917 and 1918, and which though specific in amount was held invalid.

United States v. McFarland, 15 F. 2nd 823, 838 (CCA-4), certiorari revoked 275 U. S. 485:

> "Is it not clear that the regulations in effect say to the dealers: Buy the wool from the growers, as you always have done; treat them fairly; give them as much as you safely can, knowing what we will pay for the various grades of scoured wool; so conduct your business that you will get as gross profits only 1 per cent in excess of the commission we allow you, for after all that is all that we will suffer you to retain? If you get more, we will take the excess from you, and do with it what we think best. In short, the requirement to surrender is a sanction by which the War Industries Board and its Wool Section hoped to enforce its prohibition against profiteering; that is to say, it was in the nature of a penalty. It is true that, like many other unquestioned penalties, it was to be recovered by civil suit, and not by indictment or information; but it may be a penalty all the same. If that is its real nature, there is no question that on that ground alone, to say nothing of the others already set forth, the

learned court below was right in holding that, as applied to the facts of the case before us, the regulations are invalid. The power of the War Industries Board did not extend to the imposition of penalties for the violation of the regulations it might make, no matter how wise they may have been. If the requirement to surrender excess profits was in the nature of a penalty it would have been immaterial that the defendants had agreed that it should be imposed. One cannot by agreement subject himself to the payment of a penalty for something which he may hereafter do. Moreover, it is clear that Congress may not ratify the imposition of a penalty, after the act to be penalized has been committed."

In accord, see *United States v. Avery*, 30 F. 2nd 728, 734 (D. C. S. D. N. Y.).
United States v. Smith, 39 F. 2nd 851, 858 (CCA-1).
United States v. McMurtry, 48 F. 2nd 258, 260 (D. C. S. D. N. Y.).

The four cases cited are, of course, distinguishable from this case. We refer to them only as authority to show that the liability here sought to be enforced is in its nature a penalty.

If so, the penalty is imposed not for conduct of the defendant. The defendant merely processed wool for others, who might or might not sell the products to still others, who might or might not sell to the United States. The penalty is imposed because sales were ultimately made to the United States by such others and is measured by the extent of their sales. Whether the penalty should be imposed could not be ascertained when the sales were made.

We submit that the imposition of such a penalty constitutes a denial of due process of law.

Forbes Pioneer Boat Line v. Board of Commissioners, 258 U. S. 338, 340.

B. The liability imposed by the determination that the defendant realized excessive profits during its fiscal year ended June 30, 1942, is as a result of a retroactive application of the Act of October 21, 1942, and, therefore, its enforcement deprives the defendant of its property without due process of law.

The Act of April 28, 1942, contained no definition of the terms "subcontract" or "subcontractor".

The defendant was not a subcontractor in any ordinary sense of the word. It combed wool a large part of which was probably ultimately used, after further processing, in the performance of prime contracts with the War and Navy Departments, but such prime contracts were not identified at the time when its services were rendered and may not then have been in existence (R. 233-234).

The word "subcontractor", as used in the Vinson Act, was "construed to embrace any one who, by contract or order, furnishes specified materials for intended and designed use in identified naval construction authorized by the Act."

Commissioner v. Aluminum Co., 142 F. 2nd 663 (CCA-3).

In other connections the words "subcontract" and "subcontractor" have been given a much narrower meaning.

MacEvoy v. U. S., 322 U. S. 102.
Holt & Bugbee Co. v. Melrose, 311 Mass. 424, 141 A. L. R. 319.

Certainly the word "subcontract", without express provision in the statute, would not extend to the work done by the defendant.

Section 403 was amended by the Act of October 21, 1942, which provided that the amendments made thereby should became effective as of April 28, 1942. Subsection (a) as amended provided:

> "(5) The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property."

The Secretaries of the Departments charged with the administration of the Act have construed the word "required" in the definition as meaning "ultimately used", so that work which the defendant had completed and for which it had been paid prior to the Act of October 21, 1942, was treated in this case as under a subcontract, even though prime contracts may not have been entered into until after that date (R. 103).

As a result the Act of October 21, 1942, has been given retrospective effect to create a liability for excessive profits realized prior to its enactment.

We submit that the enforcement of a liability for profits realized before October 21, 1942, by reason of the amendments effected by that Act, deprives the petitioner of property without due process of law.

Welch v. Henry, 305 U. S. 134, and *United States v. Hudson*, 299 U. S. 498, cited by the District Court in its opinion, seem to us clearly distinguishable. Both are cases upholding retroactive income taxes. The liability under the Renegotiation Act is not one for a tax, nor is it general. The Act of October 21, 1942, extended the class of persons whose contracts were subject to renegotiation and attempt-

ed to embrace retroactively completed transactions which were not within the original Act. The case is clearly different from one in which rates of tax on property or income are increased retrospectively.

C. The liability imposed, where as in this case it is for a part of the fair market price, effects an appropriation of private property for public use without just compensation.

A government constituted under a written constitution may not by its own act suspend or change the operation of the Constitution upon its own powers or enlarge the powers granted.

Ex parte Milligan, 4 Wall. 2, 120.
United States v. Cohen Grocery Co., 255 U. S. 81, 88.
Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, 156.
Home Bldg. & L. Ass'n. v. Blaisdell, 200 U. S. 398, 426.
Bowles v. Willingham, 321 U. S. 503, 521.

The Fifth Amendment to the Constitution provides:

"* * * nor shall private property be taken for public use, without just compensation."

Just compensation means fair market value.

United States v. [redacted]ler, 317 U. S. 369, 374.
United States v. New River Collieries, 262 U. S. 341, 344.
Davis v. Newton Coal Co., 267 U. S. 292, 301.
Seaboard Airline R. Co. v. United States, 261 U. S. 299, 304.

Just compensation may exceed cost plus a reasonable profit.

United States v. New River Collieries, supra.
L. Vogelstein & Co. v. United States, 262 U. S. 337.
Brooks-Scanlon Corp. v. United States, 265 U. S. 106.
C. G. Blake Co. v. United States, 275 F. 861, 867, aff. 279 F. 71.
"Compensation for property confiscated or requisitioned during war"; Annotation 137 A. L. R. 1290, 1304.

Obviously, if identical property is requisitioned from several persons just compensation to each should be the same, although the costs to each may differ widely.

If the fair value of the property taken is ten times its cost or one hundred times, the just compensation clause still protects the owner. The United States may not pay less than fair value on the ground that the owner has realized an excessive profit.

If the United States may not pay less than fair market value for property requisitioned, obviously it cannot create a right in itself to "recapture" any portion of the purchase price not in excess of fair market value on the ground that it represents excessive profits.

Baltimore & O. R. Co. v. U. S., 298 U. S. 349, 368:

> "The just compensation clause may not be evaded or impaired by any form of legislation."

If the Fifth Amendment protects the property against a taking without payment of fair market value, it must also protect the amount paid.

Suppose, however, that the United States acquires property from an owner, not by a taking, but by purchase at the fair market value. May it "recapture" a portion of the price on the ground that it represents excessive profits?

We submit that the answer must clearly be in the negative.

A contract to sell goods at lawful prices is itself property protected by the just compensation clause.

Lynch v. United States, 292 U. S. 571, 579.
Brooks-Scanlon Corp. v. U. S., 265 U. S. 106, 123.

The money received for performance of such a contract belongs to the seller and is likewise property protected by the Fifth Amendment.

Certainly, if any amount may later be "recaptured", it can only be on the ground that the price was in excess of what might lawfully have been required, *i. e.*, just compensation.

Whether a price lawful when received may become unlawful and excessive as a result of a retrospective law, consistently with due process, is a question we have discussed hereinabove. Certainly such a law could not make a price not in excess of just compensation unlawful. The power of Congress to enact legislation to recapture excessive profits must be limited by the just compensation clause to those profits realized from sales in excess of fair market value.

We do not doubt that Congress consistently with the just compensation clause might have provided for the recapture of profits on sales thereafter made directly to the United States to the extent to which prices exceeded just compensation.

To recapture profits made on sales at fair market values, however, is to take private property without just compensation.

The District Judge clearly misunderstood the contention here made. He said, in his opinion (R. 14):

> "Defendant's first contention is that Congress cannot under the powers conferred by United States Constitution Article I enact legislation to recapture excessive profits made in time of war."

That is not the defendant's contention. Its contention is that the power of Congress to enact legislation to recapture excessive profits made in time of war is subject to constitutional limitations, including those of the Fifth Amendment.

Its contention, stated in concrete terms, is that if an owner of property sells it to the United States at its fair market value, say $1,000, it is immaterial whether its cost was ten dollars or ten cents. If all that he has received is just compensation, he cannot be stripped of any part of it. If Congress cannot take the property for less than the price paid, it may not take a part of the price. Calling some amount of the price excessive profits will not change its essential nature nor deprive it of the protection of the just compensation clause.

A fortiori one, who sells not to the United States but to others who subsequently resell to the United States, cannot be deprived of his just compensation on the ground that his profits were excessive.

The power of Congress to fix prices does not include the power to require sales at those prices. The owner may retain his property, subject to the Government's power to requisition it and pay him just compensation.

In *Dayton-Goose Creek Railway Co. v. U. S.*, 263 U. S. 456, the statute permitted the United States to recapture that part of a carrier's income, earned at rates fixed by the Government, in excess of a fair return on its investment. The Court there said, at page 481, distinguishing the case of a public service company from ordinary business:

> "The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profit."

And again, at page 484:

> "We have been greatly pressed with the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation; that the income it receives for the use of its property is as much protected by the 5th Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property, and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the government a taking without due process."

The decision clearly does not authorize the recapture of profits realized from sales at fair market prices in a private business not dedicated to the public service. Legislation that provided for the recapture of such profits would clearly violate the Fifth Amendment.

The Renegotiation Act, however, authorizes a taking of profits realized from sales at fair market prices.

The Act defines "excessive profits" as "any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

In practice the authority given by the Act has been construed by the Secretaries as subject to no constitutional limitations. No attempt has been made to leave to contractors or subcontractors just compensation.

In this case, it is not disputed that the rates charged by the defendant were those established in 1941; that they were "comparable and competitive with those charged by other commission combers"; and "were the fair market rates at that time"; that they "were frozen by the General Maximum Price Regulation issued by the Price Administrator on April 28, 1942, under the Emergency Price Control Act and have never been changed, although the defendant's operating costs increased substantially during the remainder of 1942 and the first six months of 1943" (R. 232-233, 25).

It may be suggested that the Act may be upheld by construing it as authorizing the United States to recover merely that part of a seller's profits in excess of just compensation, and that the error in not so limiting the effect of the Act was the Secretaries' rather than inherent in the Act itself.

But the ascertainment of just compensation is a judicial function.

Monongahela Navigation Co. v. U. S., 148 U. S. 312, 327.

Seaboard Air Line R. Co. v. U. S., 261 U. S. 299, 304.

United States v. New River Collieries, 262 U. S. 341, 343.

Just compensation is, moreover, a question of constitutional limitations. The final determination of constitutional limitations is a judicial question which cannot be conferred upon an officer in the executive department.

Crowell v. Benson, 285 U. S. 22, 64:

> "We think that the essential independence of the exercise of judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."

National City Bank v. U. S., 275 F. 855, 859, aff. 281 F. 754, error dismissed 263 U. S. 726:

> "The executive officers of the government have no power to fix compensation, nor can the Congress determine by statute what is just compensation. The question is judicial and can be determined only by the courts."

Since the uncontroverted evidence showed that no part of the defendant's profits were derived from charges in excess of just compensation, the District Judge should have denied any recovery. The fact that those profits were derived principally from services rather than from sales of property does not withhold from the defendant the protection of the just compensation clause. The defendant's contracts for its services were its property within the meaning of the Fifth Amendment.

Lynch v. United States, 292 U. S. 571, 579.

Indeed, its charges were secured by a lien on the wool processed. See Massachusetts General Laws (Ter. Ed.), Chapter 255, Section 31A.

Its business is a property right.

Truax v. Carrigan, 257 U. S. 312, 327.

What the United States now desires to take is a part of the money which belongs to the defendant for performing its contracts at fair market rates. The money is property protected by the just compensation clause.

The constitutional provision is addressed to every sort of interest the citizen may possess.

United States v. General Motors Corp., 323 U. S. 373, 378.

3. THE ACT IMPROPERLY DELEGATES LEGISLATIVE POWER TO THE SECRETARIES OF DEPARTMENTS AND THEIR DELEGATES.

The general proposition that the legislative power of Congress cannot be abdicated or transferred to administrative officials without standards to guide them, however variously it may be stated, will hardly be denied.

Bowles v. Willingham, 321 U. S. 503, 516.
Yakus v. United States, 321 U. S. 414, 423.
A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 530.
Panama Ref. Co. v. Ryan, 293 U. S. 388, 415.
A. B. Small Co. v. American Sugar Ref. Co., 267 U. S. 233, 236.
Wichita Railroad & L. Co. v. Public Utilities Commission, 260 U. S. 48, 59.
United States v. Cohen Grocery Co., 255 U. S. 81, 89.

Congress set up no standards in the First Renegotiation Act and did not intend to create any to guide the Secretaries. No factors to be taken into consideration, such as are found in the Act of February 25, 1944, were mentioned.

The word "profits" is not defined in the Act. It is provided however, in Section 403 (ii) (3) that:

> "In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code."

It is further provided in Section 403 (d) that:

> "In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable."

Since it is obvious that any contractor may incur costs which may be characterized as "excessive and unreasonable," the statute permits a finding that profits are excessive where in fact the contractor has realized no gain and may have sustained a loss, whether or not the contractor was at fault.

The Act is applicable to individuals, partnerships, and corporations. The profits of a corporation are ordinarily computed differently from those of an individual or a partnership. Profits may be computed on a cash basis or an accrual basis or a combination of both. The Act does not state how profits shall be calculated.

It has been said that " 'profit' is undoubtedly a somewhat elastic word."

International Radio Tel. Co. v. Atlantic C. Co., 290 Fed. 698, 701 (CCA-2).

"Profits" and statutory net income as defined under the Internal Revenue Code are, of course, not synonymous. The exclusions and deductions permitted to individuals, partnerships, and corporations, under the Internal Revenue Code, differ. They are changed from time to time at the will of Congress.

Accountants may differ sharply as to the nature of profits. See Epstein: *Industrial Profits in the United States*, pages 4-5 (R. 60-61).

As to what profits are excessive, there is room for even greater difference of opinion. Are "excessive profits", as we have urged, limited by the just compensation clause to those amounts of contract prices in excess of just compensation? Are "excessive profits" profits in excess of those which could be earned under normal competitive conditions? Or should a margin of profit as great as that which could be earned under normal competitive conditions be considered excessive in war time, as the defendant was informed by the representatives of the War Department in this case (R. 236)?

The Act defines "excessive profits" as follows in Section 403 (a) (4):

> "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

This definition lays down no rule. Indeed, it says, in effect, that there is no rule, even such as might be implied from the words "excessive profits" without definition. It attempts to make the question whether excessive profits have been realized purely one of fact to be decided by a Secretary.

The Act, therefore, creates a liability "whenever, in the opinion of a Secretary * * * the profits realized from any contract * * * or from any subcontract thereunder * * * may be excessive" in an amount to be determined by the Secretary as a pure question of fact. It permits a Secretary to find "excessive profits" although the contract price is the fair market value, and although no profits have actually been realized if any costs incurred are "excessive and unreasonable". On the other hand, no Secretary is bound to form an opinion and may, in any event, exempt contracts individually and by general classes or types.

The liability created and here sought to be enforced is, therefore, wholly in the discretion of a Secretary, uncontrolled by any rules. The *arbitrium boni viri*, unrestrained and undirected, is made the test.

It may, nevertheless, be insisted that, apart from the express lack of any definition of the words "excessive profits", those words are in themselves an adequate guide to administrative action, and that the use of the word "found" in Section 403 (a) (4) is not a sufficient indication that Congress intended to leave the question to be solved in each case as one of pure fact.

But, in the first place, the words "excessive profits" are certainly not as precise and definite in their meaning as the words "excessive prices", which were held to be so vague and indefinite in decisions under the Lever Act that no one could know what they meant.

A. B. Small Co. v. American Sugar Ref. Co., 267 U. S. 233, 238:

"Section 4 provided it should be 'unlawful for any person wilfully * * * to make any unjust or unreasonable * * * charge in * * * dealing in or with any neces-

saries', or to agree with another 'to exact excessive prices for any necessaries.' In a series of cases, of which *United States v. L. Cohen Grocery Co.*, 225 U. S. 81, 65 L. ed. 516, *and Weeds v. United States*, 255 U. S. 109, 65 L. ed. 537, are examples, this court held that provision invalid as contravening the due process of law clause of the 5th Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was. By copious references to judicial pronouncements and proceedings the court illustrated that the terms 'unjust', 'unreasonable' and 'excessive' as applied to prices by that provision had no commonly recognized or accepted meaning."

* * *

* * *

"The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. *Any other means of exaction, such as* declaring the transaction unlawful or *stripping a participant of his rights under it, was equally within the principle of those cases.*" (Italics ours.)

United States v. Cohen Grocery Co., 255 U. S. 81, 89.

Weeds, Inc. v. United States, 255 U. S. 109, 111.

Tedrow v. Lewis & Son Dry Goods Co., 255 U. S. 98.

Kennington v. Palmer, 255 U. S. 100.

Kinnane v. Detroit Creamery Co., 255 U. S. 102.

United States v. Swartz, 255 U. S. 102.

United States v. Smith, 255 U. S. 102.

G. S. Willard Co. v. Palmer, 255 U. S. 106.

Oglesby Grocery Co. v. United States, 255 U. S. 108.

Waugh v. Standard Chemicals, 221 N. Y. 51.

Profits are an "amount of a contract or subcontract price". Profits differ from prices in that profits usually vary greatly whereas prices are established by the market. Market prices are usually those which will induce the marginal producer to offer his goods. Profits are determined by many factors, *e. g.*, historical or geographical advantages, access to raw materials, favorable contracts, efficiency, and many others. Prices may be found to be excessive or unreasonable when they exceed those which would be established in a free market. When do profits become excessive? We believe, as we have argued hereinabove, only when they are an "amount of a contract or subcontract price" in excess of just compensation. But even with that limitation, disregarded in the administration of the Act, the words "excessive profits" are at least as vague and indefinite as "excessive prices". In a normal competitive market, where prices are fixed by supply and demand, the words "excessive profits" are meaningless. The mere fact that demand is greatly increased by war or any other circumstance cannot mean that profits in the resulting market become excessive, particularly if increased demand does not result in increased prices. What the words "excessive profits" may mean is wholly conjectural.

Secondly, it seems clear from the debates in Congress that there was no intention to set up any standards to guide the Secretaries in their administration of the law.

See *Renegotiation of War Contracts: Law, Debates and Other Legislative Materials*, compiled for the use of the Committee on Ways and Means, by Barron K. Grier, Clerk, Government Printing Office, 1943.

The Act first took form as an amendment by Senator McKellar to an amendment proposed in the House to an appropriation bill.

When the McKellar amendment was proposed to the Senate it contained a subsection (b) which set forth certain specific profit limitations. Senator McKellar explained that the amendment had been drawn by representatives of the Army, the Navy, and the Maritime Commission, without any such schedule of rates, and that they desired such a schedule eliminated. The discussion on the Senate floor is reported in the Congressional Record for April 7, 1942, at pages 3479-3506.

Senator Taft pointed out that without subsection (b):

> "* * * the bill leaves the whole matter in the arbitrary and individual discretion of the Secretaries, without any rule whatever to determine, in the case of each contract, whether a particular contractor has or has not obtained an excessive profit." (Grier, p. 27)

On April 16, 1942, the conference report on the proposed amendments was presented to the House by Mr. Cannon. See the Congressional Record of April 21, 1942, at pages 3695-3712. We note the following (Grier, p. 89):

> "Mr. Tarver. Does the language of the amendment the gentleman suggests and which he is asking the House to adopt lay down any yard-stick for use by the Secretaries in determining what are or are not excessive profits?
>
> "Mr. Cannon of Missouri. It leaves it for him alone to determine what is a fair and reasonable profit and the formula by which he may elect to reach that determination."

Mr. Vinson of Georgia speaking of the proposed Senate amendment said, in part (Grier, p. 92):

> "It also was unacceptable in that it delegated to the various departments the absolute and unlimited authority to determine what constituted excessive profits,

without providing any standards for the assurance of the contractor and the guidance of the department head * * *.

"* * * These hearings have established that any plan for the recapture of excessive profits on war contracts, first, must contain ample authority to reach excessive profits of uncooperative contractors; second, must establish fair and reasonable standards for the assurance of the contractor and the guidance of the department head; third, must provide uniformity of treatment for all persons under substantially the same circumstances; and, fourth, must allow a fair return to the contractor on an annual basis.

"None of the proposals before the House today meet these requirements."

Mr. O'Connor is reported as saying (Grier, p. 95):

"There is no standard provided in the language whereby excess profits may be determined. What one person may think is excess profits may appear to another person to be reasonable. In other words, we are delegating the power vested in the Congress of the United States by the Constitution to three different departments to carry out."

There was discussion in the Senate of the conference report., See Congressional Record of April 23, 1942, pages 3761-3776, 3780. We note the following (Grier, p. 111):

"Mr. Vandenberg. In the process of renegotiation to which the Senator refers, what is the objective? Is there any criterion or yardstick?

"Mr. McKellar. There is no yardstick except as to excessive costs."

Again (Grier, p. 117):

"Mr. Shipstead. Then as I understand, decision as to the question of excess profits is left entirely to the conscience of the Secretary. Is that correct?

"Mr. McKellar. The conscience of the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission."

Again (Grier, p. 121):

"Mr. Pepper. Is there anything in the record of either the debate in the Senate as the Senator recalls it or in the discussions of the conferees that indicates anything in the nature of a standard or a principle which might guide the Secretaries in the administration of this proposed law?

"Mr. McKellar. No, sir."

Mr. Taft is reported as saying (Grier, p. 138):

"It is said that the procurement officers of the Army and Navy have approved this provision. I understand why they have approved it. They have approved it because it is a complete delegation of power to them to decide what ought to be done with every contract, and on what basis they shall proceed."

When the amendment of October 21, 1942, was proposed, there was a discussion in the Senate reported in the Congressional Record for October 10, 1942, pages 8306-8316. Senator Walsh explaining the amendment said in response to a question from Senator Pepper (Grier, p. 151):

"The Senator has indicated what is a serious criticism of the law, which is urged very strongly by those who want it repealed. The law deals with excessive profits, not with excess profits for tax purposes. That should be understood. The renegotiators seek to find out if a contractor, in the performance of his contract, has obtained and received excessive profits. There is no measure of what this may be. It depends upon the board itself to determine what is excessive and what is not."

In response to a question by Senator McKellar, Senator Walsh is reported as saying (Grier, pp. 154-155):

"That is true; but, of course, what the Senator was saying, and what is a perfectly legitimate criticism of the law, is that the administration gets into human hands without any yard stick; and the surprise to me

and, I think, to the other members of the committee, is that it has been so well handled, considering that it comes down to a matter of the judgment and opinion of what 'Excessive' means when considered before various boards in various parts of the country, dealing with various contracts."

On October 7, 1943, there was committed to the committee of the Whole House on the State of the Union and ordered to be printed a report of the Committee on Naval Affairs, House of Representatives, pursuant to House Resolution 30, House Report 733, 78th Congress, 1st Session. Title VII of the report is headed "Principles Applied by the Departments in Renegotiation". Excerpts therefrom were read to the District Judge and appear in the printed record at pages 70-77. They deal in part with the "lack of standards for the determination of excessive profits in the law", and indicate that the Committee believed the statute contained no such standards.

It is clear, too, that the agencies which were administering the Act were aware of no standards. The attention of the District Judge was called to testimony of the Secretary of War on September 20, 1943 before the Committee on Ways and Means of the House to that effect (R. 82-83).

On March 21, 1943, a "Joint Statement by the War, Navy and Treasury Department and the Maritime Commission" of "Purposes, Principles, Policies and Interpretations" under the Renegotiation Act was issued. This Statement makes clear that the Secretaries believed that the Act set up no standards to guide them, but left it to them to deal with each case individually. It is said (p. 3):

"Section 403 was based upon the theory that the contract prices of each contractor might be adjusted after consideration of experience in the performance thereof and after negotiation with the contractor. • • •

It is true that the very flexibility of renegotiation makes complete uniformity and certainty almost impossible and the necessity of dealing with cases individually creates a serious administrative burden."

Again, on page 4 after reciting various differences between operations of contractors:

"No formula for limiting profits can deal equitably with all these circumstances.

"Renegotiation of contracts can do what taxation and flat formulas cannot. It can fit the profit to the facts."

There is a statement of "General principles followed in determining profits", from which we quote the following (p. 7):

"(b) That reasonable profits in every case should be determined with reference to the particular performance factors present without limitation or restriction by any fixed formula with respect to rate of profit, or otherwise."

To "fit the profit to the facts" can mean only that each case must be dealt with on the basis of its own facts without any rule or guidance whatsoever other than the honest judgment of the individual who makes the determination; in other words that the judgment of a good man should be substituted for a rule of law.

In *Spaulding v. Douglas Aircraft Co.*, 154 Fed. 2nd 419 (CCA-9), the Court, while holding the Renegotiation Act of 1942 constitutional, in effect conceded that it did not by its own language set up adequate standards to guide the Secretaries. The Court says, however, at page 423:

"The Secretary of War on June 30, 1942, by mandate delegated to the War Department Price Adjustment Board the power to establish the 'policy, principles and procedure to be followed in renegotiations.'

That Board established standards for the determination of reasonable profits in war materials and services which were approved by the Under Secretary of War. Excessive profits are those in excess of reasonable profits. The factors in determining reasonable profits are those ordinarily considered by public regulatory bodies as modified by the usual conditions created by the war demand.

"Information concerning these standards was requested by the Senate Finance Committee in consideration of amendments to the Renegotiation Act with the bill for the Revenue Act of 1942, 26 U. S. C. A. Int. Rev. Acts, and a copy of the War Department's directive was furnished likewise, to a subcommittee of that Committee. Since the directive was before the Congress in the consideration of the amendment to the Renegotiation Act, its passage on October 21, 1942, gives to the standards of the War Department's directives the same validity as was given the President's curfew regulations of March 2 and 16, 1942, in *Hirabayashi v. United States*, 320 U. S. 81, 63 S. Ct. 1375 87 L. Ed. 1774. * * *

"The parallel between this case and the Hirabayashi case is precise. Here as there a contention is made of delegation of legislative, war making powers. Here as there, action was taken by executive officers of the government which was said to be without proper congressional direction. Here as there, this executive action was brought to the attention of Congress and Congress thereafter passed a statute which constituted approval of the executive action. And accordingly, here as there, no question of delegation of legislative authority remains upon. Whatever difficulties may be found in the original act, the amendments of October 21, 1942, merged the detailed administrative practice with the statute in a manner to foreclose all possibility of further doubt."

Judge Wyzanski did not in his opinion rest his decision upon the theory that Congress had by implication approved the statement issued by the War Department of the factors

to be considered in determining excessive profits, being content to say that

> "* * * so far as war powers are concerned, delegations of at least as broad scope and with as vague standards have been sustained."

It seems clear that the reasoning in *Spaulding v. Douglas Aircraft Co.*, cannot be accepted.

At the time when the statement of "Principles, Policy and Procedure to be followed in Renegotiation" was issued by the War Department, August 10, 1942, the Navy Department and the Maritime Commission were also engaged in renegotiating contracts with at least equal authority to establish principles, a policy, and procedure. Those departments were not bound either by the Act of April 28, 1942 or that of October 21, 1942, to adopt the principles followed by the War Department. In fact, as shown by the Truman Committee Report, to which the attention of the District Judge was called (R. 68-69), the departments differed widely in the types of organization which each set up, and the basic principles which each applied.

There is no evidence that Congress intended to approve the principles and policies of the War Department rather than those of the other departments.

There is no evidence in the Act itself, as there was in the statute involved in *Hirabayashi v. United States*, 320 U. S. 81, that Congress intended to approve any executive order or administrative regulation or interpretation. It does not appear that the statement by the War Department Price Adjustment Board was shown to members of Congress other than a subcommittee of the Senate Committee on Finance.

The Act as amended left the Secretary of the War Department as well as the other Secretaries free to amend or disregard any principles or policies which the War Department Price Adjustment Board, to whom the Secretary of War had delegated authority to make a statement of principles and policies, had promulgated.

Moreover, even that statement does not set up adequate standards. The portion quoted in the margin of the opinion in *Spaulding v. Douglas Aircraft Co.* concludes:

> "No attempt will be made to prescribe or even recommend actual percentages or ranges of percentages, for use in determining excessive profits. These percentages necessarily vary under all the circumstances and should be arrived at by the Price Adjustment Sections in discussions with representatives of companies engaged in the particular business under consideration."

Indeed, the word used to describe the process of fixing the liability of a contractor, "renegotiation," indicates that the existence and amount of excessive profits were to be determined not by any standards but by a bargaining process in each individual case, in which, however, the Secretary or his delegate reserved the ultimate power if no agreement was reached to impose his opinion as to what would constitute a fair "renegotiation". Plainly, the Secretaries sought in the Act which their Departments drafted authority to conduct that kind of proceeding, that is, authority to renegotiate contracts as freely as they might have been negotiated before they were made, free from any fixed rules or standards, and taking into consideration any factors which might affect a bargain. Indeed, in a portion of the statement of the "Principles, Policy and Procedure to be followed in Renegotiation" not quoted in the *Spaulding* case, this purpose is frankly avowed. It is said at page 10 of the pamphlet:

"The primary purpose of the renegotiation is to arrive at prices which would have been agreed upon when the contracts were made if the facts and factors now known had been known at that time."

It was that untrammeled and unrestricted authority which the Congress attempted to delegate. If the power exists under our Constitution to remake contracts, after performance and all the risks have been taken, to conform to the facts and factors then known, it is a legislative power.

United States v. Bethlehem Steel Corp., 315 U. S. 289, 309.

4. THE DETERMINATIONS WERE NOT DULY MADE, FOR

A. *A fair hearing was a condition precedent to any determination that excessive profits had been realized.*

If we assume that the Act sets up adequate standard to guide the Secretaries, it seems clear that its application to past facts to determine the liability if any of a contractor or subcontractor involves a judicial inquiry.

Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226, and other cases cited, *supra*, p. 26.

We suppose that it will hardly be disputed that under the Act as it existed prior to February 25, 1944, a Secretary, or his delegate, was bound to grant a fair hearing before making a determination as to the existence and amount of excessive profits.

Southern R. Co. v. Virginia, 290 U. S. 190, 195.

Due process may not require a hearing before judgment where the determination is legislative in character, that is, with respect to a rule to operate *in futuro*.

Bowles v. Willingham, 321 U. S. 503, 520.

But we submit there can be no judicial or quasi-judicial determination of the existence of a liability based on evidence of past transactions which is not preceded by an opportunity for a fair hearing. Cases like *American Surety Co. v. Baldwin*, 287 U. S. 156, where the only issue was one of law and where the judgment would be stayed pending appeal, are distinguishable.

A judicial determination which must rest upon supposed facts cannot be made without a hearing in advance of judgment.

Shields v. Utah Idaho Central R. Co., 305 U. S. 177, 182.

Ohio Bell Telephone Co. v. Public Utilities Com., 301 U. S. 292, 300.

Interstate Com. Commission v. Louisville & N. R. Co., 227 88, 91.

Lloyd Sabando S. A. v. Elting, 287 U. S. 329, 336.

But, if Congress could provide for a determination by a Secretary in advance of a hearing, there is no reason to believe that it did. Subsection (c) (2) provides that "upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits * * *." The words "upon renegotiation" imply that the proceedings are not to be *ex parte*. Renegotiation is not a situation in which administrative expediency requires a determination in advance of a hearing. The proceedings occur after contracts are completed. The Secretaries have construed the statute as requiring a hearing before a determination, and have purported to grant hearings in advance. The determinations themselves recite "hearings of which due notice was given" (R. 4, 6). Until the Act of February 25, 1944, there was no provision for any hearing before any person or board other than a Secretary or his delegate.

Although it may be conceded that the First Renegotiation Act, without the amendment granting a right to go to the Tax Court introduced by the Act of February 25, 1944, required a hearing before a Secretary in advance of a determination, the Government may now contend that the amendment altered the law in that respect. Its position may be that the amendment did not merely add an opportunity for a hearing in the Tax Court, but took away from petitioner its right to a fair hearing before a Secretary, and substituted a hearing in the Tax Court after a determination. That is, the argument, baldly stated, may be: Although a Secretary's determinations were prior to February 25, 1944, to be made only upon a fair hearing, when contractors or subcontractors aggrieved by a determination were given a remedy in the Tax Court, they *ipso facto* lost their right to a hearing before a Secretary. The existence of a right to a redetermination in the Tax Court gave the Secretaries authority to proceed arbitrarily and capriciously if they saw fit, and to base their determinations upon such evidence as they chose whether or not disclosed to a contractor or subcontractor.

We do not believe that the Court will accept that view. Congress did not provide for a stay of execution of a Secretary's determination pending a proceeding in the Tax Court, and, as this Court must be aware, the Secretaries have proceeded to enforce their determinations without awaiting a decision from the Tax Court. It is inconceivable that Congress would authorize the Secretaries to seize the property of contractors and subcontractors upon determinations made without hearing.

Indeed, it would have been wholly unnecessary to provide that proceedings in the Tax Court should be treated as "*de novo*" if it were not contemplated that there should

be a hearing in the first instance before a Secretary. If the hearing in the Tax Court was the first and only one to which contractors and subcontractors were entitled, it would be original and not "*de novo*". Those words imply the existence of a prior hearing, though not necessarily upon the same evidence.

We submit, therefore, that the right to a hearing in the Tax Court conferred by Subsection (e) (2) was in addition to and not in substitution for that which a Secretary was bound to grant.

But, the Government's position may be that, although a fair hearing before a Secretary is required, failure to seek another hearing before the Tax Court, is a waiver of defects of procedural due process in a hearing before a Secretary.

We have discussed this contention hereinabove. It was accepted by the District Judge who said in his opinion:

> "Thus, even if it be assumed that the proceedings before the secretary had an element of arbitrariness, and if it be assumed that the secretary of war applied to this defendant a capricious and highly individualized method of treatment, that arbitrariness would not have prejudiced defendant if, as provided by the Revenue Act of 1943, it had resorted to the Tax Court. Defendant's status now is exactly like that of the landowner in *Utley v. St. Petersburg*, 292 U. S. 106, 109, who was subjected to an assessment which he regarded as arbitrary but which, if he had acted promptly, he could have had examined *de novo* by an administrative tribunal. As Justice Cardozo said in recognizing liability on the assessment in that case:
>
> " 'This court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector.' "

The District Judge was, however, clearly mistaken in his views.

As we have shown above, the Secretary's determination would have prejudiced the petitioner in the Tax Court since under the rules and decisions of that Court it would be given presumptive effect.

Utley v. St. Petersburg is a wholly different case. There an assessment was proposed and a landowner offered an opportunity to be heard upon its propriety. The ordinance provided that failure to appear and object upon notice of a hearing should be deemed a consent to the proposed assessment. The assessment did not become collectible until after an opportunity for a hearing. The landowner defaulted and then brought an independent suit to set aside the assessment. In that case the party complaining was offered a hearing in advance upon an issue tendered to him, but did not claim it. In this case, the petitioner demanded a hearing and received only one lacking in the rudiments of fair play. The petitioner is not attacking the determinations collaterally. It is defending a suit in which it is alleged that the determinations were duly made on the ground that they were not duly made. If it is established that a Secretary may make such determinations only after hearing, they were not duly made. The District Court, however, on the assumption that the determinations were made arbitrarily and capriciously, proceeded to enter judgment upon them, because the petitioner might have asked for another hearing in the Tax Court and failed to do so. We may inquire, what would have been the jurisdiction of the District Court if it had appeared that the determinations of the Secretary were without due process, but the petitioner had sought a remedy in the Tax Court? Would the Court have held the filing of a petition in the Tax

Court a waiver of lack of due process in the making of the determinations?

The plain answer must be, if the determinations were not duly made, no burden of going forward to overcome them in the Tax Court was thrown upon petitioner. Petitioner had a right to insist on its right to a fair hearing before any determination was made.

B. The determinations were made without a fair hearing.

It is undisputed that although there were meetings between representatives of the defendant and of the War Department Price Adjustment Board, no hearing was ever given the defendant before any person authorized to make a determination that it had realized excessive profits (R. 235).

At the meetings, no evidence was presented as to sales, prices, and profits of any other person engaged in the business of combing wool or in any other like business, although such data was available to the Government, and was considered in making the determinations, and although the defendant requested that such data be disclosed so that it might contradict or explain inferences to be drawn from it and offer other evidence (R. 235).

No issue, which the defendant was called upon to meet, was ever presented at any of the conferences until an amount to be refunded as excessive profits was proposed (R. 235).

Obviously, these conferences did not constitute the fair hearing to which the defendant was entitled before any determinations were made.

Ohio Bell Teleph. Co. v. Public Utilities Com., 301 U. S. 292, 300:

"The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record."

Morgan v. United States, 304 U. S. 1, 18:

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claim of the opposing party and meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Moreover, the determinations do not contain the findings, if any, upon which they were based, and no statement of those findings has ever been furnished the defendant.

"No written statement of the facts used as a basis for the orders dated September 6, 1944, and of the reasons for the determinations made by said orders was ever furnished to the defendant.

"The defendant, by its attorney, at the last meeting on June 16, 1944, pointed out that such a statement was required with respect to fiscal years ending after July 1, 1943, under Subsection (c) (1) as amended by the Revenue Act of 1943, and requested that such a statement or a copy of a report of any findings by the members of the panel to the War Department Price Adjustment Board be furnished to the defendant, but the presiding officer refused, stating that it was contrary to the policy of the Board to furnish any copy of findings or statement of reasons to contractors or subcontractors." (R. 236.)

The absence of any findings in the determinations, therefore, appears to have been pursuant to a deliberate policy

of refusing to obey constitutional requirements. That findings were required as a basis for the determinations, see

Atchison T. & S. F. R. Co. v. United States, 295 U. S. 193, 202:

"In the absence of a finding of essential basic facts, the order cannot be sustained. * * *. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication."

Panama Refining Co. v. Ryan, 293 U. S. 388, 431:

"There is another objection to the validity of the prohibition laid down by the Executive Order under s. 9 (c). The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. Both s. 9 (c) and the Executive Order are in notable contrast with historic practice (as shown by many statutes and proclamations we have cited in the margin) by which declarations of policy are made by the Congress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority. If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual."

Saginaw Broadcasting Co. v. Federal Communications Com., 96 F. 2nd 554, 559 (Ct. of App., D. C.), cert. denied 305 U. S. 613:

"The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings

of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts."

We may infer that the Secretaries' unwillingness to make findings stems from the fact that the statute had given them authority with no standards to guide or limit them; that they administered the great powers given them under the Act without regard to any rules, in their uncontrolled discretion; and that they were aware that to make findings would disclose that they had acted arbitrarily and from extralegal considerations. To quote from *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, at 304:

"All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 73 * * *) of a fair and open hearing be maintained in its integrity."

WHEREFORE, the petitioner says that the judgments of the Courts below should be reversed and the case remanded with directions to enter a judgment for the petitioner.

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